

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

**ASSOCIATION OF AMERICAN
RAILROADS,**

Plaintiff,

v.

JENIFER FRENCH, et al.

Defendants.

Case No. 23-cv-02096-MHW-KAJ

MOTION FOR EXTENSION OF TIME

On September 26, 2023, Defendants Jenifer French, *et al.*, filed a Notice of Constitutional Challenge pursuant to Federal Rule of Civil Procedure 5.1(a). *See* Defs.’ Notice, ECF No. 27. Defendants report that their Motion for Summary Judgment, ECF No. 25, alleges that the preemption provision of the Regional Rail Reorganization Act (3R Act), 45 U.S.C. § 797j, violates “the fundamental principle of equal sovereignty under the U.S. Constitution, Tenth Amendment.” Defs.’ Notice.

The United States is authorized to intervene in any federal court action in which the constitutionality of an Act of Congress is drawn into question. 28 U.S.C. § 2403(a). Federal Rule of Civil Procedure 5.1(c) further provides that: “Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier.” Fed. R. Civ. P. 5.1(c). In this case, the United States’ operative deadline is November 27, 2023, unless the Court sets a later date. The Court has not yet certified the constitutional question, as required by Rule 5.1(b) and 28 U.S.C. § 2403.

Counsel for the United States respectfully advises the Court that the United States has not yet decided whether to intervene in this action to defend the constitutionality of the 3R Act's preemption provision. The approval of the Solicitor General is required for the United States to intervene in an action to defend the constitutionality of a federal statute. *See* 28 C.F.R. § 0.21. The process of obtaining a decision on intervention from the Solicitor General generally takes at least several weeks, sometimes longer. Attorneys in the Department of Justice involved in the process of recommending to the Solicitor General whether intervention is warranted, including undersigned counsel, have had competing deadlines that necessitate a request for an extension. Accordingly, the United States moves for an extension of 21 days beyond the current time period for the United States to decide whether to intervene for the limited purpose of defending the constitutionality of 45 U.S.C. § 797j. If the United States decides to intervene, it will be prepared to file its notice of intervention and accompanying memorandum in defense of the constitutionality of the statute by no later than December 18, 2023.

Undersigned counsel for the United States has conferred with counsel for Plaintiff, which consents to this request, and counsel for Defendants, who do not object to this request.

Dated: November 16, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

LESLEY FARBY
Assistant Branch Director

/s/ Brian Rosen-Shaud
BRIAN C. ROSEN-SHAUD
ME Bar. No. 006018
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 353-7667

Fax: (202) 616-8460
Email: Brian.C.Rosen-Shaud@usdoj.gov

Mailing Address:
Post Office Box 883
Washington, D.C. 20044

Courier Address
1100 L Street NW
Washington, D.C. 20005

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically
(via CM/ECF) on November 16, 2023.

/s/ Brian Rosen-Shaud
BRIAN C. ROSEN-SHAUD